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NO. 87-1960

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

KENNETH SPOOR,
PETITIONER,

V.

WILLIE BIGFORD, JR.
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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I. INTRODUCTION

Respondent, Willie Bigford, Jr., respectfully requests the Court to deny Petitioner's Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on January 5,

1988. That opinion is styled *Bigford v. Taylor, et al.*, 834 F.2d 1213 (5th Cir. 1988).

II. HISTORY OF LITIGATION

The Respondent/Plaintiff filed this action for damages in February, 1983, alleging that the County, Sheriff Taylor, and three deputies had deprived him of his truck in violation of the Fourth Amendment and without due process of law.

The defendants first justified their seizure of the truck on the basis of §49(d) of the Texas Certificate of Title Act, which authorizes impoundment of a vehicle whose driver is arrested for failure to display the required identification numbers.[1] Bigford amended his complaint to include an attack on the constitutionality of this provision.

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1. Tex. Rev. Civ. Stat. Ann. art. 6687-1, §49(d) (Vernon's 1977) (emphasis added).

The district court upheld the statute and granted summary judgment. The Fifth Circuit reversed and remanded in *Bigford v. Taylor*, 784 F.2d 1111 (February 1986 - unpublished opinion), pointing out that the statute relied upon by the County was "patently" inapplicable because the police had never arrested Bigford as the statute required.

On remand, the County argued that Bigford was under arrest and that his truck was seized pursuant to art. 47.01 of the Texas Code of Criminal Procedures, Vernon's Rev. Civ. Stat. Ann. The trial court again ruled in favor of defendants, finding that no arrest occurred but also finding sufficient probable cause to seize the truck based on the missing sticker and the indications that the VIN might have been altered. Based upon his finding of probable cause, the court ruled that

Bigford had received all the process he was due.

On appeal the Fifth Circuit affirmed in part, reversed in part and remanded for determination of damages to be assessed against Petitioner for the wrongful seizure of Bigford's truck. On June 8, 1988 Spoor petitioned for a Writ of Certiorari. Respondent Bigford responds in opposition thereto.

III.

REASONS WHY THE WRIT SHOULD BE DENIED

Petitioner advances several reasons why he believes the Writ of Certiorari should be granted in the cause *sub judice*. He does not, however, document a conflict between the decision below and that rendered by this Court or any other federal or state tribunal. Rather, his reasons involve no more than a request that this Court review the "error" of the court below. Petitioner raises no substantive issues

which have not been precluded by the prior decisions of this Court.

A. FIFTH CIRCUIT HAS RULED ON IMMUNITY CLAIM

Petitioner Kenneth Spoor asks the Court to grant his petition for certiorari on grounds that the Fifth Circuit Court of Appeals "refused to consider" and "ignored qualified immunity and the inquiry into clearly established law." (Petition for Writ, p. 6.) The opinion of the court, however, as well as the documents relied upon by Petitioner in his argument, belie that assertion.

As pointed out by Petitioner, the parties agreed upon the basic theory of qualified immunity in the joint pretrial order filed in the trial court. This agreement was before the trial court and was part of the record before the Fifth Circuit on appeal. Although never raised by Petitioner in argument, it must be assumed that the Court of

Appeals was aware of, and took into consideration in their opinion, the fact that the qualified immunity issue had been raised in the pre-trial order.

Regardless of the foregoing, the Fifth Circuit did not ignore the immunity issue in its finding of liability on the part of Kenneth Spoor. On the contrary, they decided the issue.

> "Considering the facts known to the police and available to them on reasonable inquiry at the place where the truck was seized, however, officers acting reasonably and prudently on the basis of all the available information, and familiar with the practical considerations of everyday life, would not have concluded that the truck had been stolen."

Bigford v. Taylor, 834 F.2d 1213, 1219, (5th Cir. 1988).

Thus, the court determined that the truck was wrongfully seized (that is, without probable cause to believe it was stolen) and that, at the time and under the circumstances, no reasonable officer

would have concluded otherwise. In other words, Spoor's defense of qualified immunity was denied.

B. SEIZURE LAW WAS CLEARLY ESTABLISHED

The defense of qualified immunity protects public officials from liability in the performance of duties, unless the official violates a clearly established statutory or constitutional right of another individual about which the official knew or reasonably should have known. *Jefferson v. Ysleta Independent School District*, 817 F.2d 303 (5th Cir. 1987).

The Fourth Amendment to the United States Constitution guarantees an individual the right to be secure against unreasonable searches and seizures of his property. The general principle is that a seizure of property is "reasonable" only if based on probable cause. *United States v. Place*, 462 U.S. 696, 700, 103 S.Ct. 2637, 2641

(1983), citing to *Dunaway v. New York*, 442 U.S. 200, 99 S.Ct. 2248 (1979). Probable cause requires more than an inarticulate hunch, mere suspicion, or good faith of the investigating officer. *Glass v. State of Texas*, 681 SW2d 599 (Tex. Cr. App. 1984) citing to *Beck v. Ohio*, 379 U.S. 89, 97, 85 S.Ct. 223, 229 (1964); *Brown v. State*, 481 SW2d 106 (Tex. Cr. App. 1972).

Spoor asserts that there was no "clearly established" law that required him to take into account the computer report or the apparent lack of value of the truck in determining probable cause for a seizure.

The contours of the right alleged to have been violated must be sufficiently clear that a reasonable officer would know that what he is doing violates that right. *Anderson v. Creighton*, ___ U.S. ___, 107 S.Ct. 3034, 3039 (1987).

In determining what a reasonable police officer should have known under the circumstances, however, it is not necessary to cite a specific precedent. *Farrish v. Mississippi State Parole Board*, 836 F.2d 969 (5th Cir. 1988).

> This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Farrish, at 977, *quoting Anderson*, ___U.S.___, 107 S.Ct. at 3039 (citations omitted).

In the absence of binding precedent, a court should look at all available decisional law to determine whether the right was clearly established. *Ostlund v. Bobb*, 825 F.2d 1371 (9th Cir. 1987) (citation omitted). Petitioner cannot use the absence of case law directly on point to shield him from liability. *Id.*, citing to *Anderson*

v. Creighton, ___ U.S. ___, 107 S.Ct. 3034 (1987). *See also, Lynch v. Cannatella*, 810 F.2d 1363 (5th Cir. 1987), applying *Harlow*[2] consistently with *Anderson*.

In July 1982 a reasonably competent deputy sheriff should have known that seizing a truck because it "might" be stolen, but without probable cause to believe that it was in fact stolen, was a violation of the truck owner's constitutional rights.

C. PETITIONER DID NOT ACT REASONABLY AND PRUDENTLY

In reviewing the testimony it is evident that none of the officers involved in the seizure of Willie Bigford's truck ever believed that Bigford was guilty of a crime. On the contrary, they specifically did not arrest him or charge him with any offense (Spoor deposition testimony p. 6

2. 457 U.S. 800, 102 S. Ct. 2727(1982)

l. 8-12, p. 11 l. 3-8; Lease deposition testimony p. 12 l. 2-4 to p. 13 l. 4.) and the trial court, as well as the Court of Appeals, found that no arrest ever occurred.

Despite the gloss on his argument that the seizure was authorized by clearly established law, close scrutiny of the statutes upon which Spoor relies as justification for seizure of the truck as "evidence" of a crime reveals that there were no grounds for the seizure at all. He states that removal of the FISS was prohibited by Texas law, citing to 6687-1 §49(b). Then he states that §49(c) of the same statute made it a crime to possess, sell, or offer for sale, a motor vehicle that has had the FISS removed. (Petition for Writ, p. 7-8.) What he does not state is that §49 (b) has an intent requirement and that §49(c) makes it a crime to possess such a vehicle only if he knows the sticker

is missing. Tex. Rev. Civ. Stat. Ann. art. 6687-1, §49(c)(1).[3]

Again, there was no suspicion by Spoor that Mr. Bigford had altered, changed, erased or mutilated his truck's FISS for the purpose of changing its identity, and no such charges were ever filed against him. Nor was Respondent ever suspected of, or charged with, knowingly possessing a vehicle whose serial number, motor number or manufacturer's number had been removed, changed, or obliterated. Moreover, the truck was not seized as evidence of the

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3. Section (b) states that it shall be unlawful for any person to "...alter, change, erase, or mutilate for the purpose of changing the identity,.." Tex. Rev. Civ. Stat. Ann. art. 6687-1, §49(b) (emphasis added).

Section (c)(1) states in pertinent part that a person "... who possesses, sells or offers for sale a motor vehicle...that has had the serial number, ...removed, changed, or obliterated when he knows the number has been removed, changed or obliterated commits a misdemeanor..." Tex. Rev. Civ. Stat. Ann. art. 6687-1, §49(c)(1) (emphasis added).

offense of a missing sticker, as Petitioner would now have us believe. If it had been, charges against Bigford would necessarily have been filed under one of the sections cited.

Unlike *U.S. v. Forrest*, 620 F.2d 446 (5th Cir. 1980), where the missing VIN constituted a crime, here the officers had no probable cause to believe a violation of Texas law had occurred. That fact, together with the other mitigating circumstances such as Mr. Bigford's obvious innocence and the report of "not stolen" from the computerized crime check (Spoor deposition testimony at p. 17 l. 17 to p. 18 l. 9), indicate a complete absence of probable cause to seize the vehicle.

While it may be true that law enforcement officials will in some cases simply make a mistake in judgment as to what constitutes probable cause, that was not the case here. The record is

clear that Galveston County deputies understood they were to seize vehicles in situations where the FISS sticker was missing. According to their testimony, that fact alone was sufficient to make a seizure, despite the fact that there were many instances where the vehicle, like Bigford's, turned out not to have been stolen. (Testimony of Defendant Hansen, pp. 33, 40.)

Given the information available to him at the time, Petitioner Spoor could not reasonably have come to the conclusion that probable cause existed to believe a crime had been or was being committed so as to seize Willie Bigford's truck. He simply seized the truck because the sticker was missing.[4]

In *Anderson*, this Court remanded the case for further proceedings to

4. Spoor testified that he was unaware of what law the missing FISS violated or under what authority he seized the truck. (Testimony of Spoor, p. 30, lines 10-12.)

determine whether the actions the plaintiffs alleged the officer to have taken were actions that a reasonable officer could have believed lawful. *Anderson, supra*, ___ U.S. at ___, 107 S.Ct. at 3042, n. 6. In the cause *sub judice*, however, this determination has already been made. Based on the evidence that Spoor seized the truck despite factors which militated against any suspicions that it "might" have been stolen, the Court of Appeals found that a reasonable officer could not have believed that seizure of the truck was lawful.

IV. CONCLUSION

For the foregoing reasons, Respondent suggests that the Petition for Writ of Certiorari to the United States Supreme Court should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Beatrice Mladenka-Fowler, do hereby certify that three copies of the foregoing Respondent's Brief in Opposition were served upon Petitioner by depositing same in the United States Mail, certified, return receipt requested, to the following attorney of record for Petitioner: Mr. Scott Lyford, Galveston County Legal Dept., 4127 Shearn Moody Plaza, 25th & Strand St., Galveston, Texas 77550, on this the _____ day of June, 1988.

BEATRICE MLADENKA-FOWLER